Ngo Ong Chung & Ors v Pengarah Tanah dan Galian Perak Darul Ridzuan

HIGH COURT (IPOH) — ORIGINATING SUMMONS NO 24–460–04 OF 2012
HARMINDAR SINGH J
10 MARCH 2013

Constitutional Law — Fundamental liberties — Right to property — Land matter — Conversion and subdivision of freehold lands — Condition that tenure of land would be reduced to leasehold for term of 99 years — Whether changing of tenure of lands from freehold to leasehold contrary to provisions of Federal Constitution — Whether ultra vires — Whether mere administrative act could deprive person of property — Federal Constitution art 13(1)

Land Law — Title — Conversion and subdivision of freehold lands — Condition that tenure of land would be reduced to leasehold for term of 99 years — Whether changing of tenure of lands from freehold to leasehold contrary to provisions of National Land Code — Whether application time barred by s 2(a) of the Public Authorities Protection Act 1948

Sometime in 1978, the plaintiffs applied to the defendant for conversion and subdivision of lands for development into a housing scheme which was then a freehold land. When the application was approved, the land authority also imposed a condition that the tenure of the land would be reduced to leasehold for a term of 99 years. Accordingly, leasehold titles were issued but the titles also had an error as the second plaintiff's name was misspelled as 'Ng Hong Hock' instead of 'Ngo Hong Hock'. In the present application, the plaintiffs sought for a declaration that the changing of the tenure of their lands from freehold to leasehold by the defendant was null and void and contrary to the provisions of the National Land Code ('NLC') and the Federal Constitution ('Constitution'); consequential and ancillary orders for the subdivided leasehold titles to be replaced with freehold subdivided titles registered in the name of the respective plaintiffs; and also for the name of the second plaintiff be rectified accordingly. The defendant argued that the plaintiffs' application was time barred by virtue of s 2(a) of the Public Authorities Protection Act 1948 ('PAPA'); and that the plaintiffs were estopped from filing this action as they had consented to the defendant's action in the alteration and reduction of the tenure of the land. The issues that arose for the determination of the court were whether the act of the defendant in reducing the tenure of the lands was ultra vires and therefore null and void; whether the defence of limitation under

s 2(a) of the PAPA applied; and whether the plaintiffs were estopped from seeking the prayers applied for.

Held, allowing the application:

(1) The right to one's property is found in art 13(1) of the Constitution. A mere administrative act could not deprive a person of his or her property. Any act to deprive a person of his or her property must be based on law and in accordance with the procedure prescribed by that law. In the instant case, there could be little doubt that the act of reducing the tenure of land from freehold to leasehold was not based on any law. It was ultra vires the NLC and contravened art 13(1) of the Constitution (see paras 12–13).

(2) From an analysis of s 2(a) of the PAPA, protection is limited to 'any act done in pursuance or execution or intended execution of any written law or of any public duty or authority' and that the 'neglect or default' must be 'in the execution of any such written law, duty or authority'. In other words, not every act of a public authority was entitled to protection. However, in order to get protection, an act must first be intra vires or within the power of the public authority. The defendant's action in reducing the tenure of the lands was ultra vires the NLC, without jurisdiction and a nullity. Being ultra vires and void of jurisdiction, it was invalid from its very inception. It could not be gainsaid that s 2(a) of the PAPA was intended to protect public servants acting in the execution of statutory and public duties. The intention was to protect public servants acting in accordance with the law and not outside it. It was intended to protect lawful acts and not void acts or acts which have no legal effect (see paras 16 & 19).

(3) It would be incongruous and perhaps absurd to suggest that a person who was acting contrary to the law could at the same time be said to be acting in pursuance of any law or public duty. Section 2(a) of the PAPA was not applicable in the instant case. As no other limitation period was suggested by the parties, the contention of the defendant with regard to the action being time barred was without merit and could not succeed (see paras 20–21).

(4) The jurisprudence garnered from the decided cases law was that in public law, the doctrine of estoppel could not be invoked so as to give an authority powers it did not in law possess. Put differently, statutory power could not be extended by creating an estoppel nor could an action which was ultra vires be legitimised by estoppel. Similar rules would apply to the issue of waiver and consent. Consent, waiver or estoppel could not prevail over the principle of ultra vires. The defendant's arguments in this regard must fail (see paras 27–28).

[Bahasa Malaysia summary

Sekitar 1978, plaintif-plaintif memohon kepada defendan untuk tukar syarat dan pecah bahagi tanah-tanah untuk pembangunan skim perumahan yang pada masa itu merupakan tanah pegangan bebas. Apabila permohonan tersebut telah diluluskan, pihak berkuasa tanah juga telah mengenakan syarat bahawa pemegangan tanah akan dikurangkan kepada pegangan pajak untuk tempoh 99 tahun. Selanjutnya, hak milik pegangan pajak telah dikeluarkan tetapi hak milik tersebut juga mempunyai kesilapan memandangkan nama plaintif kedua telah disalah eja sebagai 'Ng Hong Hock' dan bukan 'Ngo Hong Hock'. Dalam permohonan ini, plaintif-plaintif memohon untuk deklarasi bahawa bahawa penukaran pemegangan tanah mereka daripada pegangan bebas kepada pegangan pajak oleh defendan adalah batal dan tidak sah dan berlawanan dengan peruntukan Kanun Tanah Negara ('KTN') dan Perlembagaan Persekutuan ('Perlembagaan'); perintah berikutnya dan sampingan untuk hak milik pegangan pajak yang dipecah bahagi untuk digantikan dengan hak milik pegangan bebas yang dipecah bahagi didaftarkan atas nama plaintif masing-masing; dan juga bagi nama plaintif kedua untuk diperbetulkan. Defendan berhujah bahawa permohonan plaintif-plaintif telah dihalang oleh masa menurut s 2(a) Akta Perlindungan Pihak Berkuasa Awam 1948 ('Akta'); dan juga plaintif-plaintif diestop daripada memfailkan tindakan ini memandangkan mereka telah bersetuju dengan tindakan defendan untuk mengubah dan mengurangkan tempoh pemegangan tanah. Isu-isu yang timbul untuk penentuan mahkamah adalah sama ada tindakan defendan mengurangkan tempoh pemegangan tanah adalah ultra vires dan oleh itu batal dan tidak sah; sama ada pembelaan had masa di bawah s 2(a) Akta boleh digunapakai; dan sama ada plaintif-plaintif diestop daripada memohon tuntutan yang dipohon.

Diputuskan, membenarkan permohonan:

(1) Hak bagi hartanah seseorang tertakluk di dalam perkara 13(1) Perlembagaan. Tindakan tadbir semata-mata tidak menafikan seseorang akan hartanahnya. Apa-apa tindakan menafikan seseorang bagi hartanahnya hendaklah berlandaskan undang-undang dan mengikut prosedur yang diperuntukkan oleh undang-undang tersebut. Dalam kes ini, tidak disangsikan lagi tindakan mengurangkan tempoh pemegangan daripada pegangan bebas kepada pegangan pajak tidak berdasarkan mana-mana undang-undang. Ia adalah ultra vires KTN dan bertentangan perkara 13(1) Perlembagaan (lihat perenggan 12–13).

(2) Berdasarkan analisa s 2(a) Akta, perlindungan adalah terhad kepada 'any act done in pursuance or execution or intended execution of any written law or of any public duty or authority' dan bahawa 'neglect or default' hendaklah 'in the execution of any such written law, duty or authority'. Dalam erti kata lain, bukan semua tindakan pihak berkuasa awam berhak untuk mendapat perlindungan. Walau bagaimanapun, untuk

mendapatkan perlindungan, tindakan tersebut hendaklah intra vires atau dalam lingkungan kuasa pihak berkuasa awam. Tindakan defendan mengurangkan pemegangan tanah adalah ultra vires dengan KTN, tanpa bidang kuasa dan terbatal. Memandangkan ianya ultra vires dan tidak sah dari segi bidang kuasa, ia adalah tidak sah sejak awal lagi. Tidak dapat dinafikan lagi s 2(a) Akta bertujuan untuk melindungi pegawai-pegawai awam yang bertindak dalam melaksanakan tanggungjawab statutori dan awam. Niat adalah untuk melindungi pegawai-pegawai awam bertindak mematuhi undang-undang dan bukan di luarnya. Ia bertujuan untuk melindungi tindakan yang sah di sisi undang-undang dan bukan tindakan yang tidak sah atau tindakan yang tidak mempunyai kesan perundangan (lihat perenggan 16 & 19).

(3) Adalah tidak bersesuaian dan mungkin juga tidak masuk akal untuk mencadangkan bahawa seseorang yang bertindak bertentangan dengan undang-undang pada masa yang sama dikatakan telah bertindak mengikut mana-mana undang-undang atau kewajipan awam. Seksyen 2(a) Akta tidak boleh digunapakai dalam kes ini. Memandangkan tidak terdapat tempoh had masa yang dicadangkan oleh pihak-pihak, tuduhan defendan berkenaan dengan tindakan dihalang masa adalah tanpa merit dan tidak dapat dipertahankan (lihat perenggan 20–21).

(4) Jurisprudens yang dihimpunkan daripada kes-kes yang telah diputuskan adalah bahawa di dalam undang-undang awam, doktrin estopel tidak boleh digunakan untuk memberikan pihak berkuasa kuasa yang tidak dipunyai olehnya dalam undang-undang. Dalam erti kata lain, kuasa statutori tidak boleh diluaskan dengan membuat estopel mahupun tindakan yang ultra vires boleh disahkan melalui estopel. Peraturan yang sama boleh digunapakai terhadap isu pengecualian dan kelulusan. Kelulusan, pengecualian atau estopel tidak boleh mengatasi prinsip ultra vires. Hujahan defendan berkenaan dengan ini telah gagal (lihat perenggan 27–28).]

Notes

For cases on right to property, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2637–2668.

Cases referred to

Ban Guan Hin Realty Sdn Bhd v Sunny Yap Chiok Sai & Ors [1989] 1 MLJ 131, HC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

Bradford Corp v Myers [1916] 1 AC 242, HL (refd)

Ipoh Garden Bhd v Pengarah Tanah dan Galian, Perak, Ipoh [1979] 1 MLJ 271 (refd)

Lee Hock Ning v Government of Malaysia [1972] 2 MLJ 12, FC (refd)

A *Littlewood v George Wimpey & Co Ltd* [1953] 2 All ER 915; [1953] 1 QBD 383, CA (refd)

Lyles v Southend-on-Sea Corporation [1905] 2 KB 1, CA (refd)

Minister of Agriculture and Fisheries v Matthews [1950] 1 KB 148, KBD (refd)

B *Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, FC (refd)

Rhyl UDC v Rhyl Amusements Ltd [1959] 1 WLR 465, Ch D (refd)

Legislation referred to

C Federal Constitution art 13, 13(1)
Limitation Act 1939 [UK] s 21(1)
National Land Code
Public Authorities Protection Act 1948 s 2(a)
Public Authorities Protection Act 1893 [UK] s 1(a)
D Public Health Act 1875 [UK] s 177

A Mariadass (Kamariah bt Mohd Kassim with her) (Mariadass Lock & Ainuddin) for the plaintiffs.

Mohd Hamzah bin Ismail (Teoh Chin Chong with him) (State Legal Advisor, Perak) for the defendant.
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Harmindar Singh J:

F **[1]** The plaintiffs are seeking, vide the originating summons in encl 1, for a declaration that the changing of the tenure of their lands from freehold to leasehold by the defendant upon the issuance of the subdivided titles pursuant to an application for the conversion and subdivision of the freehold land held under Certificate of Title No 21510 No Lot 844 Village of Kampong Koh, G District of Dindings, State of Perak ('the lands'), vide Reference No PTG PK 402-2-31, is null and void and contrary to the provisions of the National Land Code ('NLC') and the Federal Constitution.

[2] The plaintiffs are also seeking consequential and ancillary orders for the H subdivided leasehold titles to be replaced with freehold subdivided titles registered in the name of the respective plaintiffs and also for the name of the second plaintiff in the subdivided titles and the register documents of title be rectified from Ng Hong Hock to Ngo Hong Hock.

I **[3]** The facts giving rise to the summons can be shortly stated. The plaintiffs are the registered co-proprietors of the lands the particulars of which are set out in the supporting affidavit. Sometime in 1978, the plaintiffs applied to the defendant for conversion and subdivision of the lands for development into a housing scheme. It was then freehold land.

[4] When the defendant approved the application for conversion and subdivision of the lands into a housing scheme, the land authority also imposed a condition that the tenure of the land will be reduced to leasehold for a term of 99 years. Accordingly, leasehold titles were issued on 4 July 1986. These titles also had an error in that the name of the second plaintiff was spelt Ng Hong Hock instead of Ngo Hong Hock. The plaintiffs are now claiming that it is illegal and contrary to the provisions of the NLC and art 13 of the Federal Constitution to issue leasehold titles instead of freehold upon subdivision and conversion of the master title.

[5] The defendant is resisting this application on the ground that the plaintiffs' application was time barred by virtue of s 2(a) of the Public Authorities Protection Act 1948 ('PAPA 1948'). The defendant also argued that the plaintiffs were estopped from filing this action as they had consented to the defendant's action in the alteration and reduction of the tenure of the land.

[6] Arising out of this factual background, the issues for consideration and decision of the court can be summarised as follows:

(a) whether the act of the defendant in reducing the tenure of the lands was ultra vires and therefore null and void? ('ultra vires issue');

(b) whether the defence of limitation under s 2(a) of the Public Authorities Protection Act 1948 ('PAPA 1948') applies? ('limitation issue'); and

(c) whether the plaintiffs are estopped from seeking the prayers applied for? ('estoppel issue').

ULTRA VIRES ISSUE

[7] Relying on the cases of *Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 and *Ipoh Garden Bhd v Pengarah Tanah dan Galian, Perak, Ipoh* [1979] 1 MLJ 271, the plaintiffs contend that the act of the defendant in issuing leasehold titles instead of freehold was ultra vires the NLC and contravened the Federal Constitution and was therefore void.

[8] The facts in the *Sri Lempah Enterprise*'s case were similar to the instant action. In that case, the applicant company, the owner of a piece of land in perpetuity, applied for subdivision and conversion of the land to enable the company to put up a hotel. The land executive committee, the approving authority at that time, approved the application with one of the conditions being that the land in question would be returned as a lease of 99 years.

[9] On appeal, the Federal Court held that the government had no power to make the applicant give up its freehold title and receive in exchange a 99 year lease. The condition which the applicant objected to did not relate to the permitted development, it was unreasonable and was used for an ulterior object, the object being to bring developed land into line with newly alienated land as to which only leases not titles in perpetuity are granted.

[10] In holding that the decision of the land executive committee was ultra vires, Raja Azlan Shah Ag CJ (Malaya) (as His Royal Highness then was) pronounced as follows (at p 148):

> Every legal power must have legal limits, otherwise therefore is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen:
>
> so that the courts can see that these great powers and influence are exercised in accordance with law.

[11] The other case of *Ipoh Garden Bhd* also had similar facts. In an application for subdivision of the applicant's land, the state authority sought to impose a condition of approval, that is, that leasehold titles be issued in lieu of freehold titles. The High Court held that the imposition of such a condition was ultra vires the National Land Code.

[12] These cases highlight an important principle in administrative law in that a public authority may not act outside its powers or ultra vires. Any such administrative act or order will be void at its inception, a nullity and having no legal effect. The right to one's property is found in art 13(1) of the Federal Constitution which provides: 'No person shall be deprived of property save in accordance with law'. This must mean that a mere administrative act cannot deprive a person of his or her property. Any act to deprive a person of his or her property must be based on law and in accordance with the procedure prescribed by that law.

[13] In the instant case, there can be little doubt that the act of reducing the tenure of land from freehold to leasehold was not based on any law. It was ultra vires the NLC and contravened art 13(1) of the Federal Constitution.

[14] To be fair, the learned assistant state legal advisor for the defendant did not strenuously argue otherwise. It was however surprising to note that after

the decision in *Sri Lempah Enterprise* and *Ipoh Garden Bhd*, the latter involving the same defendant in the present case, the defendant had persisted in issuing the leasehold titles sometime in 1986.

THE LIMITATION ISSUE

[15] Notwithstanding the ultra vires act as alluded to thus far, the defendant is now seeking refuge under s 2(a) of the PAPA 1948 which states:

> 2 Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect:
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof.

[16] It would appear from an analysis of s 2(a) of the PAPA 1948 itself that protection is limited to 'any act done in pursuance or execution or intended execution of any written law or of any public duty or authority' and that the 'neglect or default' must be 'in the execution of any such written law, duty or authority'. In other words, not every act of a public authority is entitled to protection (see also *Ban Guan Hin Realty Sdn Bhd v Sunny Yap Chiok Sai & Ors* [1989] 1 MLJ 131; *Lee Hock Ning v Government of Malaysia* [1972] 2 MLJ 12; *Littlewood v George Wimpey & Co Ltd* [1953] 2 All ER 915; [1953] 1 QBD 383 at p 587; *Bradford Corp v Myers* [1916] 1 AC 242).

[17] It might be argued that everything done by a public authority ought to be regarded as being done in execution of their powers under the statute. In this regard, Lord Buckmaster LC in the *Bradford Corporation* case clarified: '… it is not because the act out of which an action arises is within their power that a public authority enjoy the benefit of the statute. It is because the act is one which is either an act in direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority'.

[18] More importantly, and this is especially relevant to the instant action, protection is only afforded if the authority acts within their power. In the *Bradford Corporation* case, Lord Atkinson referred to the judgment of Vaughan Wiiliams LJ in *Lyles v Southend-on-Sea Corporation* [1905] 2 KB 1 where His Lordship said: 'Now, I do not think that it can have been the intention of the legislature that every act done by the corporation which was intra vires

conferred by this order should be subject to the protection afforded by this Act'. The Act being referred to here was the Public Authorities Protection Act 1893 of the United Kingdom. Section 1(a) of the 1893 Act was later replaced by s 21(1) of the Limitation Act 1939. That provision, in substantially the same terms, found its way in our own PAPA 1948.

[19] The position that obtains from the case law is that not every act of a public authority is entitled to protection. However, in order to get protection, an act must first be intra vires or within the power of the public authority. In the instant action, however, the defendant's action in reducing the tenure of the lands was ultra vires the NLC, without jurisdiction and a nullity. Being ultra vires and void of jurisdiction, it was invalid from its very inception. I cannot imagine an ultra vires act becoming intra vires over the course of time. It cannot be gainsaid that s 2(a) of the PAPA 1948 is intended to protect public servants acting in the execution of statutory and public duties. The intention is to protect public servants acting in accordance with the law and not outside it. In other words, it is intended to protect lawful acts and not void acts or acts which have no legal effect.

[20] It would also be incongruous and perhaps absurd to suggest that a person who is acting contrary to the law can at the same time be said to be acting in pursuance of any law or public duty. In *Ban Guan Hin Sdn Bhd v Sunny Yap*, allegations surfaced that customs officers fraudulently used funds for their own use when the same was meant for the purpose of excise duty. His Lordship VC George J (as he then was) held that such an act cannot be said to be act done in pursuance or execution or intended execution of any written law, of any public duty or authority or in respect of any alleged neglect or default in the execution thereof and accordingly protection of the Public Authorities Protection Act 1948 cannot be invoked.

[21] For the aforesaid reasons, s 2(a) of the PAPA 1948 is not applicable in the instant case. As no other limitation period was suggested by the parties, the contention of the defendant with regard to the action being time barred is without merit and cannot succeed.

THE ESTOPPEL ISSUE

[22] The defendant's argument in this respect is that the plaintiffs have consented and accepted the condition that the land tenure would be reduced in return for the approval for subdivision. Relying exclusively on the case of *Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283, the defendant submits that the plaintiffs are now estopped from going back on their agreement.

[23] This argument raises an interesting issue regarding the application of the doctrine of estoppel by and against public authorities. The general principle is that equitable estoppels may be successfully invoked against public authorities but not to the same extent that it is available against private parties. According to *Chitty on Contracts*, Vol 1, (13th Ed), there are four restricting factors. First, estoppel cannot be used to uphold an ultra vires transaction. Second, it cannot be used to prevent the performance of a statutory duty. Third, estoppel must not prevent or hinder the exercise of statutory powers. Fourth, estoppel has no role in matters of public law; where the circumstances are such that they would give rise to an estoppel in private law, they must be dealt with in public law using the doctrine of legitimate expectation (at para 10-039, p 786).

[24] In the case of *Minister of Agriculture and Fisheries v Matthews* [1950] 1 KB 148, the facts in a nutshell were as follows. The Minister first took possession of a large tract of land. He then created a tenancy in the name of the defendant. The tenancy expired. The defendant, however, remained in possession citing the lack of the appropriate notice prescribed by law. The Minister sued for vacant possession. The defendant raised estoppel on the basis that 'the Minister by the solemn act of his entry into the agreement was estopped from denying that he had vested a tenancy in the defendant'.

[25] On behalf of the Minister it was pleaded that '… the Minister was acting ultra vires and the agreement was of no effect to create a tenancy or to constitute a contract to grant a tenancy to the defendant'. In his judgment Lord Cassels J stated:

> It may well be that if it had been a private individual who had entered into this contract, he would have been estopped from denying that a tenancy had been created, or at any rate he might have been held liable in an action for damages, but the plaintiff is a statutory body and not an actual person and can, therefore, only perform the acts which he is empowered to perform. If, therefore, the Minister does something which is an ultra vires act, it is not the act of the Minister at all.

[26] Similarly in *Rhyl UDC v Rhyl Amusements Ltd* [1959] 1 WLR 465, the plaintiff granted a tenancy to the defendant. Section 177 of the Public Health Act 1875 required that such letting must have the consent of the Minister of Health. Since no such consent was obtained, it was held that the lease was ultra vires and void. On the question of estoppel, Herman J said (at p 474):

> If the plaintiffs were private people this would be a strong plea, but in any judgment a plea of estoppel cannot prevail as an answer to a claim that something done by a statutory body is ultra vires.

[27] The jurisprudence garnered from the decided cases law is that in public

law, the doctrine of estoppel cannot be invoked so as to give an authority powers it does not in law possess. Put differently, statutory power cannot be extended by creating an estoppel nor can an action which is ultra vires be legitimised by estoppel. Similar rules would apply to the issue of waiver and consent (see *Administrative Law* by Sir William Wade and Christopher Forsyth, (10th Ed), at pp 200–201).

[28] For the reasons stated, consent, waiver or estoppel cannot prevail over the principle of ultra vires. The defendant's arguments in this regard must fail.

THE CONCLUSION

[29] In the circumstances, and for the reasons stated, the plaintiffs are entitled to the orders that they are seeking. There will therefore be order in terms of encl 1. Since the plaintiffs are not seeking costs, there will be no order as to costs.

[30] Lastly, the parties had also agreed that the determination of the issues raised in this originating summons will also bind the parties in OS No 24–449–04 of 2012, OS No 24–530–05 of 2012, OS No 24–603–06 of 2012.

[31] Accordingly, there will be order in terms of encl 1 in those actions with no order as to costs.

Application allowed.

Reported by Afiq Mohamad Noor